BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996	**DOCKET NO. T-00000A-97-0238**

RESPONSE OF QWEST CORPORATION TO STAFF'S REQUEST FOR COMMENT

Introduction

On June 20, 2002, the Staff of the Arizona Corporation Commission ("Commission") invited parties to submit comment in this docket on "whether they believe that provisions in several of these agreements wherein the CLECs agreed not to participate in the 271 proceeding or other proceedings before the Commission in any way adversely affected the integrity of the 271 record." The Staff seeks "a detailed discussion" by any party who believes that any of the unfiled agreements adversely affected the integrity of the 271 proceeding, "includ[ing] what you believe to be any outstanding issues as a result of such agreements and how the Commission can best resolve them."

Qwest agrees with the Staff's emphasis on seeking concrete details from any party who might argue that the integrity of the Section 271 proceeding has been affected by these agreements. The Commission has conducted over three years of workshops and hearings on a

broad spectrum of issues to examine whether Qwest has met the requirements of Section 271. During this process, the Commission has heard extensive comment from AT&T, WorldCom, and other CLECs, whose ability and incentive to raise all possible issues relevant to Section 271 cannot be doubted. WorldCom's response to the latest set of data requests propounded by the Staff makes clear the comprehensive scope of issues that have already been addressed in the proceeding so far. Specifically, WorldCom states that it has raised "[a]ll issues including all of the 14 point section 271 checklist items, OSS test and related matters, PAP, change management, SATE, preorder-to-order integration, manual handing of CLEC LSRs, Qwes[t] secret agreements, public interest issues." WorldCom Responses to Staff's 3rd Set of Data Requests, No. 3-3 (June 20, 2002). WorldCom claims that not all issues have been resolved to its satisfaction. Although Qwest disagrees with WorldCom's claim (as well as its assertion that so-called "Qwest secret agreements" are relevant to Section 271), it is clear that those issues will not lack an advocate.

The Commission's Section 271 analysis has included an exhaustive Third Party Test of Qwest's Operations Support Systems ("OSS") managed by Cap Gemini Ernst & Young. The Commission also retained Hewlett-Packard Consulting ("HP") to serve as a pseudo-CLEC in that test process, a role that required it to emulate a CLEC establishing a business relationship and conducting ongoing activities as a wholesale customer of Qwest. HP's activities included simulating every aspect of the CLEC business, plus interviewing other CLECs when it deemed such investigation appropriate. All of this took place simultaneously with a similar test of all of the same functionality by the thirteen Regional Oversight Committee states, managed by KPMG Consulting ("KPMG"). KPMG specifically reviewed its test to determine whether the unfiled agreements, including those that included provisions on non-participation in Section 271 proceedings, had tainted its review of Qwest's OSS and determined that they had not.

This process of analyzing Qwest's Section 271 compliance is near its conclusion, and the Commission should not now allow itself to be diverted by vague or general allegations about issues that allegedly have not been adequately examined. The Staff is correct that the question now should be whether any party can point to specific issues that are outstanding as a result of an agreement wherein a CLEC agreed not to participate in the 271 proceeding. As discussed below, there were only two such agreements.

Any such outstanding issues must be relevant to Section 271. Issues about the specific requirements of Section 252 are not appropriate matters for this Commission to consider as part of the Section 271 public-interest inquiry. The FCC and the courts have specifically rejected attempts to turn the public-interest requirement of Section 271 into a catch-all for any issue that an intervener seeks to raise.[1] Furthermore, to the extent that the Section 252 filing standard is unclear and the variety of proposed standards offered by the parties to the Section 252 proceeding demonstrates its lack of clarity — and all participants in the Section 252 proceeding agree that there is substantial doubt — there is no need to resolve it here. The issue is before the FCC, and until the FCC rules, Qwest has committed voluntarily to file and seek approval of the range of agreements that its opponents assert should be filed. This commitment ensures compliance with any reasonable standard under Section 252, triggering Commission review under Section 252(e) and adoption rights under Section 252(i). Consequently, CLECs have the

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[1] *See, e.g., SBC Kansas/Oklahoma Order*, 16 FCC Rcd 6237, ¶ 19 (2001) ("The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application .... [Section 271 proceedings] are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability."), *modified, Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001); *AT&T Corp. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000) (rejecting an interpretation of Section 271 that would allow "virtually every aspect of the [FCC's] local competition regulations" to be challenged in a Section 271 proceeding).

full protection of Section 252 to access interconnection services and unbundled network elements under Section 251, thus satisfying all obligations that Qwest may have under Section 271.

The Two Agreements

As Qwest noted in its June 18, 2002, letter to Commissioner Spitzer, only two of the seven agreements identified by the Staff in its June 7th recommendations contained any provision concerning the CLEC's participation in Section 271 proceedings. Those two agreements were (1) the December 31, 2001, Confidential Billing Settlement Agreement with XO Communications, Inc., and its subsidiaries (collectively "XO"); and (2) the November 15, 2000, Confidential Agreement with Exchelon Telecom, Inc. ("Eschelon"). The other five other agreements simply settled challenges to the merger of Qwest with U S WEST. For example, Qwest's agreement with AT&T said nothing about the Section 271 proceedings and, as Staff recognized, could not have tainted the integrity of any portion of that docket.

Thus, the *only* issue remaining is whether the two agreements that included provisions concerning a CLEC's participation in Section 271 proceedings adversely affected the integrity of the 271 record.

XO Agreement

The agreement with XO served the public interest and promoted the interests of Section 271 by resolving certain 271-related and non-271-related issues and making the resolution of the 271-related issues available to all CLECs. Qwest and XO had billing disputes as well as disputes about reciprocal compensation and the methods for measuring paging, ISP-bound traffic, and non-ISP-bound traffic. The agreement plainly resolved those disputes in their entirety. Recognizing the obligation to make certain of those resolutions available to all

similarly situated carriers, the agreement provided that amendments to the Qwest-XO interconnection agreements in Arizona and five other states would be filed within fifteen business days of the execution of the agreement. The issues resolved included the following:

- Paging traffic will be treated for all purposes as Internet service provider ("ISP") traffic for all states.
- ISP traffic shall be determined pursuant to the terms of the FCC's April 2001 order for all states as of June 14, 2001.
- Whether in particular circumstances and in particular states XO would bill Qwest for non-ISP traffic at the end-office rate or at the tandem rate.

Because these provisions were filed as an amendment to the interconnection agreement in Arizona on April 3, 2002, they will become available to other CLECs pursuant to Section 252(i) on July 2, 2002. As part of the resolution of those issues, XO agreed to stipulate to the appropriate state and federal regulatory agencies that Qwest complies with the 271 checklist in Arizona, Colorado, Oregon, Minnesota, Utah, and Washington.

The XO agreement thus explicitly resolved all of XO's issues concerning Qwest's compliance with Section 271, and the resolutions of those issues were made available to all CLECs through filed interconnection agreements. The agreement *promoted* the interests of Section 271 by creating a region-wide resolution of a set of controversial issues affecting CLECs. There can be no argument that there are "outstanding issues" as a result of this agreement.

Nor can it be argued that XO's non-participation in the 271 proceedings led to the failure of any Section 271 issue to be considered in this docket. The purpose of the agreement with XO was to structure a Qwest-XO business-to-business relationship and to gain greater certainty about certain financial issues affecting XO, in anticipation of a possible bankruptcy

filing by XO. In fact, XO's decision to not participate in the 271 proceeding seems to pre-date the agreement. XO had not participated in any 271 proceedings since 1999, and there is no reason to believe that it would have chosen to expend its extremely limited resources by participating in a regulatory proceeding in 2002. Certainly, there is no reason to believe that XO would have raised any issues that had not already been raised by AT&T, WorldCom, or any other party to the 271 proceeding.

Eschelon Agreement

The business-to-business agreement with Eschelon did not prevent any issues from being considered in the 271 proceeding. This agreement provides, quite simply, that Qwest and Eschelon will "(1) develop an implementation plan by which to mutually improve the companies' business relations and to develop a multi-state interconnection agreement; (2) arrange quarterly meetings between executives of each company to address unresolved and/or anticipated business issues; and (3) establish and follow escalation procedures designed to facilitate and expedite business-to-business dispute solutions." Furthermore, "*if* an agreed upon Plan is in place by April 30, 2001, Eschelon agrees to not oppose Qwest's efforts regarding Section 271 approval or to file complaints before any regulatory body concerning issues arising out of the Parties' Interconnection Agreements." (Emphasis added.)

As we discussed more specifically in response to Eschelon's recent letter to Commissioner Spitzer, it is inappropriate to suggest that Qwest at any time forced Eschelon to remain silent on 271-related issues. Eschelon decided, of its own free will, to work with Qwest to resolve the business issues between them. Eschelon could have decided at any point in the negotiation process that it did not wish to enter into an agreement with Qwest and, instead wished to pursue its claims through regulatory processes including 271. Indeed, throughout the

negotiation process and afterward, Eschelon evidenced a continuing awareness of its ability to go to the regulators if its concerns were not addressed. Even after the agreement was signed, if Eschelon believed that Qwest was not living up to its commitments in the agreement, Eschelon could have sought redress through regulatory or legal avenues. Any suggestion by Eschelon that Qwest could, or did, prevent Eschelon from participating in the 271 process is simply baseless. Furthermore, the entire agreement, including any agreement not to oppose Qwest's application for relief under Section 271, *was terminated in February 2002*. To the extent that Eschelon decided not to participate fully in the 271 process after that termination, it was Eschelon's internal business decision that mandated that result, not its agreement with Qwest.

This agreement did not adversely affect the integrity of the 271 proceeding. In fact, it served the interests of Section 271, because its purpose was to develop an implementation plan that would address issues raised by Eschelon in negotiations and improve the provisioning process for all CLECs. It was the creation of this implementation plan that was the basis for Eschelon's exercise of its discretion not to participate in the 271 proceeding.

Furthermore, as described in Qwest's letters to Commissioner Spitzer, Eschelon's participation in Qwest's Change Management Process ("CMP") and CMP Redesign Process was never restricted. Eschelon has been one of the most active and vocal participants in both the redesign meetings and the monthly CMP meetings.

Eschelon's letter to Commissioner Spitzer makes several accusations about the circumstances of the agreement, but nowhere does it attempt to provide information addressing Staff's question: whether the agreement "in any way adversely affected the integrity of the 271 record ... includ[ing] what you believe to be any outstanding issues as a result of such agreements and how the Commission can best resolve them." Nor would it be possible for any

party to demonstrate that the agreement with Eschelon prevented this Commission from considering any issues relevant to Section 271 compliance, given the formidable capabilities of the interveners and the comprehensive and exhaustive record built and analyzed by the Commission over the last three-plus years.

Eschelon also references news reports concerning an oral agreement between Qwest and McLeod. Once again, Eschelon's inference – that the McLeod agreement somehow affected the 271 proceedings – is groundless. McLeod orally agreed to remain neutral on Qwest's 271 applications provided that Qwest continue to comply with all agreements between McLeod and Qwest and with all applicable statutes and regulations. There is nothing wrong with McLeod exercising its discretion not to be involved in 271 as long as Qwest lived up to its contractual and legal obligations to McLeod.

Yesterday, AT&T sent to Commissioner Spitzer a copy of a letter dated February 8, 2002, from Eschelon's President, Richard A. Smith, to Qwest's former Chairman, which it filed in both this docket and the Section 252 docket. In that letter, Mr. Smith makes a series of unfounded allegations about Qwest's conduct. The letter repeatedly misstates facts about pricing, service, and other disputed issues. As Qwest stated in a responsive letter on February 15, 2002, Qwest takes strong exception to Mr. Smith's letter and categorically rejects Mr. Smith's characterization of Qwest and its employees. Qwest's letter, which is attached hereto, did not dignify each of Mr. Smith's allegations with a response, but did emphasize that Qwest is looking forward to charting a new course for a wholesale business relationship with Eschelon.

Argument

It should go without saying that no party has an obligation to expend the time and resources necessary to participate in lengthy, regulatory proceedings such as the Section 271

docket. It is reasonable for a party to conclude that it can advance its interests more effectively by building a less confrontational relationship with a business partner, who is committed to addressing business issues outside the regulatory process. Qwest itself believed that it could do so, and some CLECs freely decided to work through private processes rather than regulatory litigation.

Settlements outside of the regulatory process are both legal and desirable. Indeed, there is a strong public policy in favor of encouraging the private settlement of disputes instead of litigating them in formal proceedings. The Arizona courts have held repeatedly that it is in the public interest to promote settlements between litigants.[2] Further, at the time of the Qwest–U S WEST merger, the Minnesota Commission, for example, specifically encouraged Qwest and U S WEST to settle disputes with various CLECs outside of the regulatory process. Minnesota PUC Chairman Gregory Scott stated at the February 29, 2000, hearing on the merger that Qwest and U S WEST should "go talk to these folks and get a resolution. If you're really not opposed to conditions and if there really are concessions, it seems to me that you ought to go figure it out."[3] Qwest and a number of CLECs ultimately settled a number of issues outside of the merger review process, leading Commissioner Edward A. Garvey to note at the subsequent hearing in April that the Commission was:

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2 *See, e.g., Ahern v. Central Pacific Freight Lines,* 846 F.2d 47, 48 (9th Cir. 1988); *Dansby v. Buck,* 92 Ariz. 1, 11, 373 P.2d 1, 8 (1962); *Emmons v. Superior Court,* 192 Ariz. 509, 512, 968 P.2d 582, 585 (1998); *Shell Oil Co. v. Christie,* 125 Ariz. 38, 39, 607 P.2d 21, 22 (1979).

3 Transcript, *In the Matter of the Merger of the Parent Corporation of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc. and U S WEST Communications, Inc.,* MPUC Docket No. P-3009 (Feb. 29, 2000) at 93:17-20.

> glad that the parties settled, that stipulations were achieved, that parties sort of reached understanding. And we . . . basically orchestrated, through our decision-making process and the decision to send this to an ALJ, for just this kind of outcome.[4]

Qwest is not surprised that other parties are now trying to paint these settlement agreements as somehow sinister. Despite the excellent work of this Commission and its staff over many years, these other parties have demonstrated that they will never concede that the 271 record is complete. Essentially, they are arguing that the Commission should, in hindsight, second-guess the business decisions of carriers who choose to resolve matters outside the regulatory process. In a market such as this one, the public interest favors business-to-business dispute resolution rather than regulatory litigation.

Qwest notes that its business-to-business negotiations with specific CLECs led to resolution of issues that benefited all CLECs. Qwest learned about CLEC needs in ways that generally improved its efforts to provide CLECs with access to the network. As Qwest implements a wholesale service process to address an issue for one CLEC, such as Eschelon or XO, that process is implemented uniformly and all CLECs benefit from the improved process.

The June 7, 2002 Staff Report (in Docket No. RT-00000F-02-0271) recognizes the legal uncertainty regarding which contractual arrangements between ILECs and CLECs needed to be filed and approved before they took effect under Section 252(a) and which did not. The Staff Report also recognizes that Qwest operated in good faith in this area. The legal issue of which ILEC-CLEC agreements must be filed pursuant to Section 252(a) is also before the FCC, and while it is pending, Qwest will comply with Staff's recommendations, including the filing of the agreements listed on pages 17-18 of that report. Qwest will also comply with the standards set forth in that report on a going-forward basis.

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4 4/25/00 Minnesota Merger Transcript at 150:11-18.

Any suggestion that Qwest's Section 271 application for Arizona is not being fully and aggressively litigated, or that there are no committed advocates opposing Qwest's application, is simply not credible. Numerous parties, including the Staff, RUCO, AT&T, WorldCom, and multiple other CLECs, have participated extensively in this proceeding, and they certainly have not been reticent about raising non-participant carriers' issues.[5] No party could fairly suggest that the record in this matter is incomplete in any way, or that the issues have been inadequately litigated.

Other state commissions have considered and rejected the argument advanced by AT&T that the issue of Qwest's confidential business-to-business agreements warrants a delay in its consideration of Qwest's Section 271 application. This Commission should also proceed with its almost-completed consideration of Qwest's Section 271 application in Arizona.

Respectfully submitted this 27th day of June, 2002.

QWEST CORPORATION

By: _____

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5 *See, e.g.*, Exhibit 322 (Roth Aff.) at 10:15-15:7 (discussing concerns of Onvoy, Inc., Touch America, SunWest Communications, Rhythms Links, Inc., and MCI Metro); *see also* WorldCom Responses to 3rd Data Requests of ACC Staff, Staff 3-3 (June 20, 2002) (describing the range of issues raised by WorldCom).

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February 15, 2002

BY TELECOPY AND FIRST CLASS MAIL

Richard A. Smith
President, Chief Operating Officer & Director
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Minneapolis, MN 55402

Re: Level 3 Escalation

Dear Mr. Smith:

I am writing in response to your letter dated February 8, 2002, requesting that we meet to resolve certain issues within 10 days, pursuant to Level 3 of the Escalation Procedures and Solutions Agreement between Eschelon Telecom, Inc. and Qwest Corporation, dated November 15, 2000. Afshin Mohebbi and Gordon Martin will be my representatives in addressing the business issues that you raise in your escalation letter. I look forward to hearing about your efforts to resolve issues of common concern to Eschelon and Qwest in a manner that is fair and efficient for both parties.

Sincerely,

Joseph P. Nacchio
Chairman and Chief Executive Officer
Qwest Corporation

cc: Drake S. Tempest, Esq.
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February 15, 2002

BY TELECOPY AND FIRST CLASS MAIL

Richard A. Smith
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Re: Level 3 Escalation

Dear Mr. Smith:

I am writing in response to your letter dated February 8, 2002 to Joseph Nacchio, to which he has responded today by naming Afshin Mohebbi and me as his representatives. Mr. Mohebbi and I are, of course, committed to meeting with you to discuss issues of common concern to Eschelon and Qwest in an effort to resolve those issues in a manner that is fair and efficient for both parties.

For the record, I should note that Qwest takes strong exception to your letter, which repeatedly misstates the facts concerning pricing, service, and other disputed issues. I categorically reject your characterization of Qwest and Qwest employees. Furthermore, let me emphasize that as a matter of corporate policy, Qwest expects its representatives to adhere to appropriate standards of business conduct in every context. Consistent with that policy, Qwest's employees compete fairly within the bounds of the law.

A point-by-point rebuttal of your letter will not serve any constructive purpose at this juncture. I do, however, feel compelled to comment briefly on a few

of your examples of Qwest's alleged "bad conduct." First, you allege "threats and abuse of monopoly power," pointing to alleged statements of Dana Filip regarding Eschelon's participation in the change management process. However, Ms. Filip made no statements that can be construed in this manner. Rather, she simply asked that Eschelon negotiate in good faith and refrain from acting in an obstreperous manner during the change management re-design working sessions.

Your claim that Audrey McKenney made an improper request to "destroy and appropriate audit documents" is also wide of the mark. In fact, as Ms. McKenney explained to you, the data underlying the audit consist of highly confidential customer specific-records, and must be handled accordingly under appropriate law. Eschelon's refusal to designate its own audit report as a statement in settlement negotiations under Federal Rule of Evidence 408 fails to protect Eschelon's audit report, which contains information about its own long distance customers, and the underlying data from discovery by third parties. That data was shared between both parties under prior confidential billing agreements between the parties and solely for the purpose of resolving our billing disagreements. Ms. McKenney's request was totally appropriate given Eschelon's statement that it was considering distributing the audit reports to third parties.

Furthermore, your claim that Qwest improperly attempted to influence Eschelon's testimony puts an unreasonable construction on the facts. Qwest's request for Eschleon's support carries with it an implicit understanding that of course any Eschelon testimony would be truthful. If Eschelon had needed a reminder of its obligation to comply with the law, of course, Qwest would have made such a limitation explicit by modifying the proposed agreement. Qwest has no interest in any support from Eschelon that the company is not willing to give freely and based on accurate facts.

Finally, you state that Qwest drafted and published in its *Lightspeed* publication a statement that was attributed to you without your consent. We had understood that you had fully endorsed this statement, as reflected in your e-mail dated January 24, 2002, which I recently re-sent to you. Naturally, Qwest will not use this statement now that you have retracted it.

Again, I am not interested in cataloging Qwest's disagreement with the other claims with your letter. I want to look ahead. My team has spent considerable time attempting to put our business relationship back on a positive footing. If your desire to chart a new course for our wholesale business relationship is sincere, I am sure that we will be successful in doing so.

Sincerely,

Gordon Martin
President, Qwest Canada and Latin America
EVP, Global Wholesale Markets

cc: Joseph P. Nacchio
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